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FILED
FEB 14 1963
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 655

PACIFIC QUEEN FISHERIES, *et al.*,
Petitioners,

vs.

L. SYMES, *et al.*,
Respondents.

PACIFIC QUEEN FISHERIES, *et al.*,
Petitioners,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS IN REPLY

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Statement

This reply brief is submitted pursuant to Rule 24(1) of this Court and is limited to matters raised in "Brief for Respondents in Opposition" which have not been fully covered in the Petition.

ARGUMENT

I

Respondents may not convert the laxity of their surveyor into a foundation for a defense of "concealment."

John W. Elkins, the United States Salvage Association surveyor who conducted the 1957 condition survey (Pltffs. Exh. 17)[1] of PACIFIC QUEEN upon which the granting of the insurance in this litigation was predicated, did not testify at the trial. Respondents would not produce him and, living in California (R. 1172), he was beyond the range of Petitioners' subpoena. His deposition (Pltffs.' Exh. 52;[1] R. 1171-1225) was taken, however, and the excerpts quoted from it hereunder show Elkins' carelessness and that Petitioners' suppressed nothing.

Record, p. 1184:

> "Q. Now, when you met Mr. Jasprica [Chief Engineer], did you recognize him? Did you know who he was? A. No.
>
> Q. Did you talk to him? A. Not about the vessel, as I recall. I think we talked more about the previous fishing season, and—
>
> Q. Well, did you ask him who he was? A. No, sir.
>
> Q. Did you ask for help? A. No, sir.
>
> Q. Did you ask him to accompany you? A. No, sir.
>
> Q. Did you ask him where the chief engineer was? A. No, sir.
>
> Q. Did you ask him where the master was? A. No, sir."

Record, p. 1186:

> "Q. Did you ask him to get any help for you that you wanted? A. No.

[1] Offered R. 348; received R. 351.

Q. Did you ask him to put any light on the ship? A. No.

Q. Do you normally require help in making your surveys, or do you make them alone? A. Small boat, make them alone; larger vessel, you are supposed to have somebody with you.

Q. Now, is this a large vessel that you were supposed to have— A. I would consider it a fairly large vessel.

Q. And you were supposed to have somebody with you? A. According to our rules, yes.

Q. Did you obey your rules? A. No."

Record, p. 1188:

"Q. Now, there is evidence in the case, and I think it is undisputed, that the Pacific Queen sailed on the 27th day of May; now, there were twenty-five days between the time of your survey and her sailing; did you ever go back aboard the ship in those twenty-five days? A. Well now, I am going on memory, and I may be wrong, but it seemed to me that I was over there on some other job and I dropped by there one afternoon to see if they had filled those CO_2 bottles. I think I did.

Q. Did you look around the ship some more? A. No. In that particular case, I was only checking that bank of CO_2 bottles down there.

Q. Was there any reason, anything that would prevent you from looking around further if you wanted to? A. No.

Q. Did you ask for any further assistance in looking over the ship? A. No.

Q. At any time during the twenty-five days from the day of your first examination until her sailing, did you ever [20] ask for any assistance from anyone connected with the vessel to help you on a further survey? A. No.

Q. Were you ever denied access to any area of the vessel that you wished to look at? A. No."

Record, p. 1193:

"*By Mr. Dow*:

Q. You note on Page 2 that there is a reference there to gasoline-powered gill net boats (Handing to witness)? A. Uh-huh.

Mr. Stephan: Now, sir, please answer yes or no for the record.

The Witness: I beg your pardon.

A. Yes.

By Mr. Dow:

Q. Did you ask to see where the gasoline was stored? A. No."

Record, p. 1196:

"Q. And you were never refused any information on this vessel, [29] were you? A. Not in this particular case.

Q. Were you ever refused any information on the Pacific Queen? A. No.

Mr. Dow: That is all. Thank you."

Record, p. 1209:

"*By Mr. Dow*:

Q. Tell us about the time you were at Bristol Bay. What year was that? A. Oh, I don't know, probably '50, '51, '52, along in there, '53. I had a fire up there, and I went to Alaska maybe four or five times a year, various parts of Alaska.

Q. When you were up at Bristol Bay, were they using power gill netters there at the time? A. Yeah."

Record, p. 1217:

"*By Mr. Dow:*

Q. Did you ever see any gasoline storage on any of the reefer vessels in the Northwest? A. Yes, I have seen it."

Record, p. 1220:

"*By Mr. Dow:*

Q. You saw these gill net boats on the Pacific Queen, didn't you? A. Yes, sir.

Q. And some of them were gasoline driven boats, were they not? A. Yes, sir.

Q. Did it ever occur to you to discover if any gas was carried aboard the ship? A. No.

Q. And if so, how? A. No, it never occurred to me.

Mr. Dow: That is all."

The Court of Appeals has stated that the District Court was not "* * * clearly erroneous in finding that the changes were *not* necessarily apparent to Elkins" (Pet., Op. 15a). Respondents claim on page 14 of their brief that Petitioners "* * * do not challenge the two courts' findings that the alterations were not observable by reasonable inspection." Petitioners submit that such findings, based upon Elkins' deposition, are unsupportable. We are not dealing with a needle in a haystack, here. We are concerned with four gigantic tanks on a small, 173 foot (Pet., Op. 2a) vessel and fittings "* * * located on or near a passageway where ship's equipment, fishing gear and personnel frequently pass[ed] back and forth" (F. F., R. 261).

Insurers *knew* gas in bulk was carried *below deck* prior to the Elkins 1957 survey (R. 780, 783-786; Marquat survey —Pltffs.' Exh. 16; R. 630). This knowledge put them upon inquiry as to the details and manner of this stowage and Petitioners cannot be considered remiss in assuming that

Insurers, through the Elkins survey, had satisfied themselves as to whether or not they should take the risk of insuring a fishing vessel with large quantities of bulk gasoline aboard.

Conclusion

Respondents' brief follows the path of the Court of Appeals in citing limitation of liability cases for putative insurance principles, in ignoring the decisions underlying the "privity" section of the *Marine Insurance Act*, in side-stepping the "perils of the seas" and "fire" coverage afforded by the policies, and in failing to acknowledge that any defect in the filing of a jury demand in the State court case was cured in open court before removal of this case on consent to the Federal court.

The Court of Appeals' opinion has crisscrossed the *Marine Insurance Act* with numerous propositions foreign to historical English marine insurance principles. The Anglo-American maritime community now looks to this Court for a proper delineation of the applicable law and usage.

There are special and important reasons for the granting of a writ of certiorari and Petitioners respectfully pray that such writ be issued.

Respectfully submitted,

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